No. 648, 180

Term No. 1898.

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Transcript of Record for U. S. Court of

UNITED STATES SUPREME COURT.

Filed Sept. Oct., 1899.

October Term, 1898.

JACOB SCHAEFFER,
Plaintiff in Error,

vs.

HENRY S. T. SCHMEYER,
Defendant in Error.

Error to the Supreme Court of Illinois.

Motion to Dismiss Writ of Error,

AND

BRIEF OF DEFENDANT IN ERROR.

JOHN S. MILLER,
Attorney for Defendant in Error.

M. W. ROBINSON,
Of Counsel.

CHICAGO

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1898.

Term No. 658.

JACOB FORSYTHE,
Plaintiff in Error,
vs.
HENRY F. T. VEHMEYER,
Defendant in Error.

Error to the Supreme Court of Illinois

MOTION TO DISMISS WRIT OF ERROR.

And now comes the defendant in error, Henry F. T. Vehmeyer, by his counsel, and moves the court to dismiss and annul the writ of error issued in the above entitled cause, and to dismiss the suit in error out of this court, because the decision of said cause in the Supreme Court of Illinois involved no Federal question, and the record of said cause discloses no question over which this court will take jurisdiction.

JOHN S. MILLER,
Attorney for Defendant in Error.

Brief.

This suit, in the trial court, was an action of debt upon a judgment alleged to have been rendered in the Superior Court of Cook County, Illinois, July 29, 1871, in favor of plaintiff Vehmeyer, against defendant Forsythe.

Pleas, 1st, *nul tiel record*, on which issue was joined; 2d, defendant's discharge in bankruptcy, in December, 1880. To this plea plaintiff replied in substance that the action, in which the judgment sued on was rendered, was brought to recover damages suffered by plaintiff, by reason of fraud, consisting of false representations of the defendant, on which plaintiff was induced to rely; and that such original action and the judgment recovered therein were founded solely upon said fraud of defendant, and the judgment therefore not discharged by defendant's discharge in bankruptcy.

Defendant by rejoinder traversed the material allegations of plaintiff's said replication; and thus issue was joined on the facts set up in plaintiff's replication, the law of the plaintiff's contention not being disputed.

The trial court found the issues for plaintiff and gave judgment June, 1897, for the amount of the original judgment sued on, with interest thereon.

Upon appeal to the Appellate Court of Illinois, First District, the judgment of the trial court (modified to correct a confessed clerical error in the amount found as damages) was affirmed. And all the questions of fact raised by the issues and evidence in the cause were fully presented, discussed and considered in the Appellate Court and by that court decided in favor of the plaintiff, appellee, Vehmeyer. This appears in the opinion of the Appellate Court, by Adams, Presiding Justice, which is incorporated in the record in this case.

Upon further appeal by defendant Forsythe from the judgment of the Appellate Court to the Supreme Court of Illi-

nois, the judgment of the Appellate Court was affirmed and the opinion of the Appellate Court is set forth in full and adopted as the opinion of the Supreme Court.

Under the laws of Illinois the Supreme Court accepts as final the findings of the Appellate Courts upon all questions of fact. In this case the Supreme Court have expressly concurred in and adopted the findings and conclusions of the Appellate Court as to all questions of fact involved. So that there can be no question concerning what the Supreme Court of Illinois holds to be the facts found in the case.

It is apparent on the face of this record that no question of law raising any Federal question was decided in this case; and that the decision of the Supreme Court of Illinois adverse to the defendant was solely upon questions of fact.

The validity of the Bankrupt Act of 1867 was not denied. The right of defendant, by virtue of having been discharged under that law, to all protection and immunity given by that law was not questioned. The law itself provides (Bankrupt Act of 1867, U. S. Rev. Statutes, Sec. 5116) that "No debt created by the fraud or embezzlement of the bankrupt * * * shall be discharged by proceedings in bankruptcy," etc. The only question raised in the case relating to the statute of the United States was whether or not the claim sued on was based upon the fraud of the defendant. This was purely a question of fact, put at issue by the pleadings, and to be determined upon the evidence in the case. Notwithstanding the claim was reduced to judgment, the record of such judgment may be looked into, and if it shows a material and traversable allegation of fraud as its sole foundation the debt is founded in fraud, and from it the bankrupt's discharge will not release him.

Warner v. *Cronkhite*, 6 Bissell, 453.

This question of fact was to be determined by the evidence contained in the record of the original judgment sued on in this case, or by the testimony as to what that record contained.

The Supreme Court of Illinois, in the opinion adopted by them in the case, decide as follows:

"Whether the judgment sued on was for fraud is a question to be determined from the record. (*Flanagan* v. *Pearson*, 14 National Bankruptcy Register, p. 37, 42 Tex. 1.) We think it clear that the judgment in question was recovered for the fraud of appellant, and that his discharge in bankruptcy did not discharge him therefrom." A few paragraphs further on they say: "There was only one count in the declaration" (in the original suit), "and it was held in the last case that whether the judgment was recovered for fraud is not a question for the jury but must be determined from the record. The suit having been in *case* for fraud and the declaration having been framed accordingly the judgment is conclusive as to the fraud, and the fraud is not, as contended by appellant's counsel, merged in the judgment."

This court has uniformly held in a large number of cases that it has not jurisdiction to review, upon writ of error, the decision of a State court upon a question of fact.

Bartlett et al. v. *Lockwood et al.*, 160 U. S. 357.
R. Bridge Co. v. *Kansas P. R. Co.*, 92 U. S. 315.
Martin v. *Marks*, 97 U. S. 345.
Kenney v. *Effinger*, 115 U. S. 577.
Quimby v. *Boyd*, 128 U. S. 488.

"It is likewise settled that the opinion of the Supreme Court * * * is a part of the record, and that it may be examined in order to ascertain the questions presented."

Egan et al. v. *Hart et al.*, 165 U. S. 188.

In *Dower* v. *Richards*, 151 U. S. 658, it is said: "That this court, in an action at law at least, has no jurisdiction to review the decision of a State court upon a pure question of fact, although a Federal question would or would not be presented according to the way in which the question of fact was decided, is clearly settled by a series of late decisions," etc., citing numerous cases.

We respectfully submit that there is no question presented by this record which this court, under a writ of error, will exercise jurisdiction to review. We deem it unnecessary to call the attention of the court to the further fact. manifest in this record, that in the decision of this case the Supreme Court of Illinois decided adversely to plaintiff in error upon several other points contended for by the appellant in that court, and which involved no reference to any alleged Federal question.

Defendant in error submits that the record in this cause discloses no ground for Federal jurisdiction, and that the writ of error in this cause was manifestly taken solely for purposes of delay. Wherefore the defendant in error, by his counsel, asks that damages be awarded him, at a rate not exceeding ten per cent, in addition to interest, and his costs in this behalf expended.

Respectfully submitted,

JOHN S. MILLER,
Attorney for Defendant in Error.

M. W. ROBINSON,
Of Counsel.